83-798

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1983

DIONICIO QUINTANILLA, JR,

PETITIONER
(PLAINTIFF-APPELLANT),
V.

SCIENTIFIC-ATLANTA, INC.,

RESPONDENT
(DEFENDANT-APPELLEE).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DIONICIO QUINTANILLA, JR.
1441 HARLIN DR.
WYLIE, TEXAS 75098
(214) 442-6254

PRO-SE
(LAY-LITIGANT)

QUESTIONS PRESENTED

1. Should a court of appeals deny jurisdiction in appeal from an order refusing to grant an extension of time to appeal in Civil Procedure when trial counsel, a sworn officer of the Court, allows time for appeal to expire, as specified in F.R.A.P. 4(a), without appealing an adverse trial court decision, or advising his client that said decision has been rendered, thus being in clear breach of duty and agreement with his client ?

2. Should an aggrieved party be denied the right of appeal by a court of appeals, effecting denial of DUE PROCESS OF LAW, in Civil Procedure if his notice of appeal is not filed timely in accordance with F.R.A.P. 4(a) because his trial counsel, a sworn officer of the Court, fails to represent him in appeal in clear breach of duty and agreement with the aggrieved party ?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes & Rules

TABLE OF AUTHORITIES

Treatises

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

DIONICIO QUINTANILLA, JR,

PETITIONER

(PLAINTIFF-APPELLANT),

V.

SCIENTIFIC-ATLANTA, INC.,

RESPONDENT

(DEFENDANT-APPELLEE).

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

The petitioner, Dionicio Quintanilla, Jr., respectfully prays that this venerable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit

entered on 20 July 1983.

OPINION BELOW

The Court of Appeals entered its Order granting Respondent's motion to dismiss on 20 July 1983. A copy of the Order is attached as Appendix A.

The Court denied petitioner's motion to stay mandate pending certiorari on 25 August 1983. A copy of the order is attached as Appendix B.

JURISDICTION

The decision of the court of appeals was entered on 20 July 1983. A timely motion to stay the mandate pending certiorari was denied by order of 25 August 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. §2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the curcumstances.

2. F.R.A.P. Rule 4(a)(1) provides:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30

days after the date of entry of the judgment or order appealed from; ...

3. F.R.A.P. Rule 4(a)(5) provides:

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). ... No such extension shall exceed 30 days past such prescribed time ... .

4. The Fifth Amendment of the United States Constitution provides :

Nor shall any person ... be deprived of life, liberty, or property without due process of law ... .

STATEMENT OF THE CASE

Petitioner, Dionicio Quintanilla, Jr., was employed by respondent company, Scientific-Atlanta, Inc., an employer

within the meaning of 42 U.S.C. § 2000e, from about 28 November 1977, until 15 August, 1980.

During this time petitioner was employed as a sales representative mostly for the Instrumentation Division. Then, the National Sales Manager, Mr. Ben Forrester, for the Cable Communications Division offered petitioner a position with the Cable Division because of his demonstrated sales abilities with the Instrumentation Division. Petitioner was then employed as a Field Sales Representative from about 15 December, 1979, until 15 August, 1980.

Petitioner was attracted to the position with the Cable Division with offers of the opportunity to earn larger quarterly bonuses than he was previously earning with the Instrumentation Division. Indeed, petitioner did earn about

$5000.00 in bonuses for each of the two full quarters, compared with an average of $300.00 to $400.00 per quarter with the Instrumentation Division, until he was terminated by Mr. Ben Forrester on 15 August, 1980. The larger quarterly bonuses were possible because of the large volume of sales which this petitioner enjoyed, peaking at $1,000,000.00 per month. This large sales volume was unmatched by any new Field Sales Representative, and yet this petitioner was terminated without recourse, for unjustifiable reasons, and without proper termination benefits.

Upon termination, plaintiff appealed to the respondent company's corporate officers for relief, subsequent to which this petitioner received proper termination benefits, but no offers for continued employment or to salvage his career

with the company.

In five months subsequent to his dismissal from Scientific-Atlanta, this petitioner consulted with Haldane Career Consultants and the Human Potential Center, as well as attending the University of Texas at Dallas, all at tremendous financial expense to rehabilitate and retrain for a new career in Computer Science. On 27 January, 1981, this petitioner accepted a professional position as a Computer Software Engineer.

On 11 February, 1981, this petitioner filed his amended Charge of Discrimination numbered 061311066, based on National Origin (Mexican American), with the Equal Employment Opportunity Commission at the Dallas District Office. The EEOC conducted an investigation with Scientific-Atlanta, for which investigation this petitioner was not given an opportunity

to defend against the company's defenses and new charges, further embellishing upon the original reasons given for his termination, and subsequent to which the EEOC issued its determination and Right to Sue on 1 June, 1981.

Later in the summer of 1981, this petitioner filed suit against Scientific-Atlanta in the U.S. District Court for the Northern District of Texas, the Dallas Division, with Civil Action number CA-3-81-1437-D. This action was prepared and filed by this petitioner's retained counsel, Mr. Frank P. Hernandez, and sought to recover for the wrongful termination of his employment with Scientific-Atlanta., because of his Mexican-American national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

Subsequent to the filing of this petitioner's complaint in district court, considerable discovery was done in the form of interrogatories and depositions until trial on October 6, 1982. Then, on 6 January, 1983, district Court entered Findings of Fact, Conclusions of Law, and Judgment on this cause, ordering that:

> " ... the plaintiff take nothing, that the action be dismissed on the merits ... ."

It did not become known to this petitioner until about 15 March, 1983, that the district court had disposed of his case. After one telephone conversation with his trial counsel, this petitioner was unsuccessful in repeated attempts to contact his trial counsel again. At this time, time had expired for filing Notice of Appeal, or for filing a Motion for Extension of Time to Appeal, in accor-

dance with F.R.A.P.4(a).

At this time, this petitioner's trial counsel, a sworn officer of the Court, has denied him the right of appeal, in clear breach of duty and agreement at trial to appeal this cause should a judgment be rendered adverse to this petitioner.

Subsequent to this time, this petitioner has researched and filed numerous actions in courts below attempting to recover his right of appeal. For his efforts, this petitioner has suffered mockery from counsel for the respondent, Scientific-Atlanta, and summary dismissal from the courts below. In respondent's

> "MEMORANDUM OF APPELLEE SCIENTIFIC-ATLANTA, INC. IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL AND IN OPPOSITION TO APPELLANT'S MOTION FOR APPOINTMENT OF COUNSEL "

counsel for respondent maintains that

> "This appeal and Quintanilla's motion are but the most recent in a series of meritless papers filed over the last few months ... ."

This memorandum is of date 9 June, 1983, in the Fifth Circuit Court of Appeals. But for these "meritless papers" this petitioner would not now be in a position to submit this petition to this Court. On 16 August, 1983, counsel for the respondent maintained at the Fifth Circuit Court of Appeals in their brief

> "APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO STAY MANDATE "

the following

> "Appellant also has now attempted to suggest that he has a meritorious claim that he will pre-

sent to the Supreme Court of the United States ... ."

Likewise, the courts below have denied jurisdiction or lack of authority to consider this petitioner's extraordinary circumstance for being out of time to appeal with the following orders :

In District Court, 27 April 1983; deny Motion for Extension of Time for Appeal, and Motion for Appointment of Counsel.

In Fifth Circuit, 20 July 1983; motions not considered because the court has no jurisdiction to entertain the appeal: APPEAL DISMISSED.

On 5 May, 1983, this petitioner filed timely his notice of intent to appeal district court's denial of Motion for Extension of Time for Appeal and his Motion for Appointment of Counsel. An

order refusing to grant an extension of time to appeal is appealable. in re Orbitec Corp., C.A.,N.Y. 1975, 520 F.2d 358. On 20 July, 1983, the court of appeals below dismissed this appeal, and did not consider this petitioner's motions for appointment of counsel and to strike exhibits from the appellee's memorandum.

On 10 August, 1983, this petitioner filed timely his motion to stay mandate pending certiorari in civil action. On 25 August 1983, the court of appeals below entered its order denying this motion without opinion. In the brief

"APPELLEE'S BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO STAY MANDATE "

counsel for Scientific-Atlanta maintains that :

> " ... the unsuccessful civil litigant whose lawyer fails to take an appeal from an adverse judgment is not left without a remedy, for he always has available to him a malpractice action against the attorney in question."

The suggestion in this brief is that this petitioner is not entitled to

> " ... the allowance of out-of-time appeals (as) in criminal cases."

because he has not suffered

> " ... loss of his liberty. "

as the criminal defendant whose

> "lawyer ... fails to take a timely appeal, as he had agreed to do ... "

These suggestions are preposterous because no malpractice action can remedy

the charges made against this petitioner by the trial court, which cannot be substantiated by the record, nor its determination, and this petition follows.

REASONS FOR GRANTING THE WRIT

I. The actions of the appeal court below are inconsistent with a previous Fifth Circuit opinion by Circuit Judge Bell in 1967 in the case of Brewen V. USA (375 F.2d 285).

In the referenced case, Judge Bell held "It is settled that an appeal from the judgment of a Federal District Court is a matter of right. Coppedge V. USA, 1962, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21." supra, 375 F.2d at 286 .

In this cause, this petitioner was denied right of appeal effecting denial of due process of law by the court below when it granted respondent's motion to

dismiss his timely appeal from an appealable order at district court denying petitioner's Motion for Extension of Time For Appeal, and his Motion for Appointment of Counsel. In re Orbitec Corp., C.A.N.Y. 1975, 520 F.2d 358.

II. The action of the appeals court below in dismissing this petitioner's appeal differs from the per curiam opinion of the U.S. Court of Appeal (D.C.) where in two instances effecting "OUT-OF-TIME APPEAL", the denial of these at District Court were remanded for rehearing and appointment of counsel.

In this cause, the court below did not even consider this petitioner's Motion for Appointment of Counsel, submitted on 23 May, 1983, in which he subscribes to the worthiness of his cause.

The two cases refered to here are first a criminal case in Carrell V. USA, 344 F.2d 537 (1965), and second a civil case in Alley V. Dodge Hotel, 501 F.2d 880 (1974)

In Carrel V. USA, the court held that

> " ... a hearing to determine whether failure to take a timely appeal is to be excused is so critical to the basic right of appeal that one who is without counsel and urges the claim must be offered the assistance of counsel." supra F.2d at 538

In Alley V. Dodge Hotel the court held that :

> "We also note that the district court's responsibility on this remand extends to the appointment of counsel, if deemed necessary, to assist Alley in sub-

stantiating his allegations, if any of excusable neglect."
supra, 501 F.2d at 886.

In dismissing the appeal, the court below also denied this petitioner relief from the district court's denial of his Motion for Appointment of Counsel.

III. The action of the appeals court below in denying jurisdiction in this petitioner's appeal differs from two previous Fifth Circuit actions accepting jurisdiction in "OUT-OF-TIME APPEALS" in criminal cases, as well as from similar actions in the Seventh Circuit, and the Court of Appeals (DC).

The cases involved are :

(1) ALLEY V. DODGE HOTEL, C.A.(DC) Civil - 61 days after judgment 501 F.2d 880 (1974)

(2) Carrell V. USA, C.A.(DC)
Criminal-approx 333 days
after judgment
335 F.2d 686 (1964)

(3) Brewen V. USA, (5 cir),
Criminal, 375 F.2d 285
(1967)

(4) Kent V. USA, (5 cir),
Criminal, 423 F.2d 1050
(1970)

(5) Calland V. USA, (7 cir),
Criminal-approx 203 days
after judgment
323 F.2d 405 (1963)

Considering that this petitioner's Notice of Intent to Appeal, from an appeallable order, was filed timely in district court on 5 May, 1983, the appeals court below was clearly remiss in denying jurisdiction in this appeal, and further in refusing to consider

this petitioner's Motion to Strike Exhibits from Appellee's Memorandum.

IV. The action of the appeals court below in dismissing this petitioner's appeal differs from the per curiam opinion of the U.S. Court of Appeal (D.C.) in Alley V. Dodge Hotel, 501 F.2d 880, where the Court held that F.R.A.P. 3 and 4 tolerate a common sense approach to timely filing of a notice of appeal.

In the referenced case, the opinion of the Court was :

" It is clear beyond cavil that Appellate Rules 3 and 4 tolerate a common sense approach to timely filing and do not insist upon 'literal compliance in cases in which it cannot be fairly exacted ... ' "

(Advisory Committee Note to F.R.A.P. 3), supra, 501 F.2d at 884 .

It is clear that the court of appeals below has not used a common sense approach in considering this petitioner's "extraordinary circumstance" for not timely filing his Notice of Intent to Appeal when his trial counsel was in clear breach of duty and agreement to appeal a judgment adverse to his cause.

V. The action of the appeals court below in dismissing this petitioner's appeal differs markedly from this Court's opinion in 1972 in the case of Haines V. Kerner, 404 U.S. 519, 92 S.Ct. 594, declaring that pro se complaints are to be held to less stringent standards than formal pleadings drafted by lawyers.

In Alley V. Dodge Hotel, 501 F.2d 880, the Court of Appeals (DC) held by per curiam opinion that :

> " Any approach to problems presented in Alley's lawsuit must yield consideration to the fact that he is a pro se litigant untrained in the law. " re Haines V. Kerner, 404 U.S. 519, 92 S.Ct. 594 .

Not only district court but also the appeals court below have held this petitioner to strigent interpretations of F.R.A.P. 4(a) in clear contradiction to this Court's ruling cited above, and in total disregard for this petitioner's right of appeal and the fact he is without counsel in his appeal because his trial counsel abandoned the appeal in breach of duty and agreement with this petitioner.

VI. The actions of the courts below in denying this petitioner's motions for extension of time for appeal and his motions for appointment of counsel and in dismissing the appeal disregard this petitioner's excusable neglect as set forth by Judge Pell at the Seventh Circuit in 1971 in the case of Files V. City of Rockford, 440 F.2d 811 .

In Files V. City of Rockford Judge Pell held that :

" The matter of what constitutes excusable neglect is discussed in 9 Moore's Federal Proctice ¶204.13[1], at 971-974(2d ed. 1970)[1]

---

[1] reference Advisory Committee Note to the 1966 amendment to former rule 73(a)

> ' ... that in cases not involving failure to learn of entry of judgment, the Districts Courts may and should restrict extensions of time for filing notice of appeal in civil cases to extraordinary cases where injustice would otherwise result ' ", supra, 440 F.2d at 815 .

In this case, the courts below have ignored the extraordinary circumstance alledged by this petitioner that his trial counsel abandoned him in clear breach of duty and agreement to appeal his case should an adverse decision be rendered against him by district court.

VII. The actions of the appeals court below are inconsistent with four appeals court cases in which breach of duty and agreement were

cause for denials at district court of extension of time to appeal to be vacated or reversed, and remanded.

The cases involved are :

(1) In the Fifth Circuit, in Brewen V. USA, 1967, 375 F.2d 811, Judge Bell held :

" ... a criminal defendant with retained counsel must look to his counsel for guidance in taking the appeal. His right of appeal is lost by a failure to timely file a notice of appeal through fraud and deceit of his retained counsel." supra, 375 F.2d at 286, 287 .

(2) In the Fifth Circuit, in Kent V. USA, 1970, 423 F.2d 1050, the Court held by per curiam opinion that :

" Petitioner's claim is that he was denied effective aid from his court-appointed counsel. He alleges that he requested his attorney to appeal the conviction and that his attorney intimated that he would do so but never did.

****

Atilus[2] is clearly controlling here if Petitioner desired an appeal and made this desire known to Counsel and Counsel declined to take and prosecute the appeal.

****

If the request was made and not carried, for whatever reason ... Petitioner was denied

---

[2]Atilus V. USA, 5 cir, 1969, 406 F.2d 694

effective assistance and is entitled to an out-of-time appeal." supra, 423 F.2d at 1051

(3) In the Seventh Circuit, in Calland V. USA, 1963, 323 F.2d 405, Judge Schnackenberg held :

" We agree with counsel for appellant that one who justifiably believes that he is represented by Counsel and who instructs his counsel to appeal and is assured by counsel that the appeal will be filed should not suffer a loss of rights if Counsel proves faithless ... "

supra, 323 F.2d at 408.

(4) In the Court of Appeals (DC), Carrell V. USA, 1964, 335 F.2d 686, the Court held by per curiam opinion that the Denial of Motion

> for Extension of Time to Appeal be vacated and remanded to District Court. Petitioner's Motion for Extension of Time for Appeal in forma pauperis alleged that within ten days of sentence, petitioner informed his trial counsel, an officer of the Court, that he wished to take an appeal, and that trial counsel informed petitioner that he would file a timely notice of appeal.

In the same manner as these four cases, this petitioner deserved to have his denial of Motion for Extension of time to Appeal remanded for a determination of excusable neglect because he has maintained that his trial counsel proved faithless in appealing his case, thus causing this petitioner to lose his right of appeal.

VIII. This petition raises the important issue addressed by the Court of Appeals (DC) in 1974 in Alley V. Dodge Hotel, 501 F.2d 880, that civil appeals are entitled to the same consideration as criminal appeals when pro se litigants are involved.

In Alley V. Dodge Hotel, the court held by per curiam opinion that :

" In view of the hospitable approach which generally must be taken with pro se litigants, we perceive no reason why the same considerations do not surround civil appeals (as in Johnson V. USA, 132 U.S. APP.D.C. 4. " Alley V. Dodge Hotel, supra, 501 F.2d at 886.)

In this cause, this petitioner has been denied the same relief afforded the civil case of Alley V. Dodge Hotel and numerous criminal cases in Out-Of-Time Appeals.

The financial losses that this petitioner has suffered as a result of the loss of his career with Scientific-Atlanta constitutes LOSS OF PROPERTY, and thus entitles this petitioner to the same due process of law guaranteed by the Fifth Amendment as has been afforded criminal appeals, even though his liberty or life are not at stake.

IX. The actions of the courts below in denying this petitioner's motions for extension of time for appeal and his motions for appointment of counsel and in dismissing the appeal disregard the fact that his right of appeal was lost because of the faithlessness of an officer of the Court.

In the Seventh Circuit, in Calland V. USA, 1963, 323 F.2d 405, Circuit Judge

Schnackenberg held :

> " ... those charged with fraud (faithlessness) are officers of the Court under whose sanction they are permitted to practice their profession therein ... " supra, 323 F.2d at 409 .

The courts below then have sanctioned the faithlessness and breach of duty and agreement by this petitioner's trial counsel who promised to appeal should an adverse decision be rendered against him.

CONCLUSION

The matter of the preservation of the right of appeal in Out-Of-Time Appeals in criminal cases where life or liberty are at stake has generally been resolved. However, this Court has yet to address and resolve the issue of the preservation of the right of appeal in Out-Of-Time Appeals in civil cases where the

loss of right of appeal has resulted from the faithlessness and breach of duty and agreement by trial counsel, an officer of the Court. This petitioner respectfully prays for this Court to consider the important issues presented in this petition, protect the right of appeal in civil cases, and remand this case for a determination of excusable neglect in the extension of time to appeal, and the appointment of counsel.

Respectfully submitted,

Dionicio Quintanilla, Jr.
Pro Se Lay Litigant
1441 Harlin Dr.
Wylie, Texas 75098
(214) 442-6254

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were sent by United States mail, first class, postage prepaid, to the following counsel of record for Respondent, Scientific-Atlanta, Inc., this 9th day of November, 1983 :

Susan A. Cahoon
Kilpatrick & Cody
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

_____

Dionicio Quintanilla, Jr.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1288

US Ct APPEALS
FILED
JUL 20 1983
GILBERT F.
GANUCHEA U, CLERK

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff-Appellant,

V.

SCIENTIVIC-ATLANTA, INC.,

Defendant-Appellee.

- - - - - - - - - - - -

Appeal from the United States District Ct
for the Northern District of Texas

- - - - - - - - - - - -

Before: BROWN, TATE and HIGGINBOTHAM,
Circuit Judges.

By the Court:

It is ORDERED that the motion of Scientific-Atlanta, Inc., to dismiss the appeal is GRANTED. The notice of appeal is not timely. Fed. R. App. P. 4(a)

It is FURTHER ORDERED that the motions of Dionicio Quintanilla, Jr., for appointment of counsel and to strike exhibits from the appellee's memorandum are not considered because the court has no jurisdiction to entertain the appeal.

APPEAL DISMISSED.

ISSUED AS MANDATE: AUG 25 1983

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1288

US Ct APPEALS
FILE
AUG 25 1983
GILBERT F.
CANUCHEAU, CLERK

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff-Appellant,

V.

SCIENTIFIC-ATLANTA, INC.,

Defendant - Appellee.

- - - - - - - - - - -

Appeal from the United States District Ct

for the Northern District of Texas

- - - - - - - - - - -

O R D E R :

The motion of APPELLANT

for stay ... of the issuance of the

mandate pending petition for writ of

certiorari is DENIED.

****

/s/ JOHN R. BROWN

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA-3-81-1437-D

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff

V.

SCIENTIFIC-ATLANTA, INC.,

Defendant

- - - - - - - - - - - - - -

O R D E R

The motion to have transcript prepared at government expense for appeal purpose filed by plaintiff came on for consideration before the Court. Since the plaintiff has failed to properly perfect an appeal of this action, the Court is of the opinion that it should be denied.

It is so ORDERED.

Dated this 13 day of May, 1983.

/s/ R. M. HILL

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U.S.DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
APRIL 27 1983
NANCY S. HALL
CLERK

CIVIL ACTION NO. CA-3-81-1437-D

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff

V.

SCIENTIFIC-ATLANTA, INC.,

Defendant

- - - - - - - - - - - - - -

O R D E R

Came on for consideration the Motion for Extension of Time for Appeal, filed by Plaintiff Dionicio Quintanilla, Jr., on April 26, 1983, and his Motion for Appointment of Counsel. The Court is of the opinion that the motions should be denied.

Quintanilla seeks to appeal from the

Judgment of this Court entered on January 6, 1983, denying him any relief and dismissing his claims. Rule 4(a)(1), Fed. Rules App. Proc., provides that an aggrieved party must file notice of appeal in a civil action within 30 days after entry of judgment. Pursuant thereto, Quintanilla was required to file a notice of appeal by February 5; however, he failed to do so. An extension of this 30 day time period can be granted by the district court. Rule 4(a)(5) further provides that the "district court, upon a showing of excuseable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Quintanilla failed, however, to file a motion for extension of time to file a notice of appeal <u>within</u> the 30 day period following February 5. Having failed to

do so, this Court lacks the authority to grant an extension of time within which Quintanilla can file a notice of appeal from the January 6 Judgment. His motion for such relief must be denied.

Quintanilla's motion to have counsel appointed should also be denied.

It is so ORDERED.

Dated this 27 day of April 1983.

/s/ R. M. HILL

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA-3-81-1437-D

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff

V.

SCIENTIFIC-ATLANTA, INC.,

Defendant

- - - - - - - - - - - - - -

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for consideration before the Court without a jury, the Honorable Robert M. Hill, United States District Judge, presiding. After considering all the evidence and the arguments of counsel the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Dionicio Quintanilla, Jr., plaintiff, seeks to recover for the wronfgul termination of his employment with Scientific-Atlanta, Inc., defendant, because of his Mexican-American national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

2. Quintanilla is a United States citizen of Mexican-American national origin, who was born in the United States.

3. Quintanilla was employed by Scientific-Atlanta on November 28, 1977, as a Field Sales Representative in the Instrumentation Division. Quintanilla was responsible for sales activities in an assigned territory for the products produced in the Instrumentation Division of Scientific-Atlanta. Quintanilla had a tendency to be abrupt at times and impatient while dealing with customers of

Scientific-Atlanta. He also experienced some difficulty with working with personnel in the Atlanta, Georgia, headquarters.

4. On December 15, 1979, Quintanilla moved to a Field Sales Representative position in the Cable Communications Division. This Division produces a different product line from the Instrumentations Division. It manufactures and markets equipment used in cable television systems, including ground stations, set top units, head end equipment and other components for cable television.

5. Quintanilla was recruited by the sales position in Cable Communications by Ben Forrester, National Sales Manager for the Division. Forrester, who is not of Mexican-American national origin, learned from Quintanilla's superviser in the Instrumentation Division that Quintanilla could be released to Cable Communications. Cable Communications desired to broaden

the scope of its coverage and to penetrate the Southwestern territory then being serviced out of the home office in Atlanta by having an additional sales representative available to cover that territory from Dallas, Texas, where Quintanilla was stationed.

6. After an interview, Forrester employed Quintanilla in the Cable Communications Division and assigned him the Southwestern territory. At the time, Forrester did not know that Quintanilla was a Mexican-American.

7. After Quintanilla's employment, the existing accounts of Scientific-Atlanta in the Southwestern territory which were being serviced by the sales representative that Quintanilla replaced were assigned to Quintanilla.

8. Quintanilla attended trade shows in California and Texas and training programs in Atlanta, during which he had an

opportunity to hear explanations of the products from technical personnel and how to penetrate the cable television market. Quintanilla was also accompanied by Forrester in calling on accounts so as to assist Quintanilla in learning how to make sales. Quintanilla also made trips to the Atlanta headquarters of Scientific-Atlanta for the purpose of familiarizing himself with headquarters personnel with whom he would be dealing and to give him an opportunity to meet with the manufacturing and other technical personnel to learn more about the product lines he would be selling and requirements for making sales. Quintanilla was furnished adequate training and instructions as to how to perform his duties as a sales representative of the Cable Communications Division.

9. Quintanilla developed substantial problems in his working relationship with Atlanta personnel of Scientific-Atlanta.

He had a tendency to function independently of headquarters and its procedures. At times Quintanilla became impatient in his dealing with headquarters personnel, who were confronted with backlog of requests for quotes or the development of proposals for Cable Division customers. This was evidenced by rudeness and abruptness in communications from Quintanilla to headquarters personnel.

10. In some instances the nature of the sales function in the Cable Division involves assisting a customer to understand how various products of Scientific-Atlanta might be integrated most effectively into that customer's existing system and to project his future needs. This entails an engineering function. In Atlanta there were applications engineers specifically trained and experienced in this aspect of the sales process. Quintanilla attempted to perform what

amounted to applications engineering functions for customers on his own, without proper consultation or coordination with headquarters personnel. Quintanilla had an engineering background, but he lacked knowledge of the particular needs of the cable television industry before transferring to the Cable Division. Quintanilla made recommendations to his customers which were not based on adequate study nor proper recommendations to fulfill the customer's needs. Quintanilla also stated or implied to Atlanta personnel that he possessed superior knowledge about the needs of his customers and how to do the applications engineering and he refused to accept recommendations from Atlanta technical personnel. On occasion he suggested approaches that would have violated Scientific-Atlanta procedures and standards. As a result, several heated arguments and a strained relation with techni-

cal personnel at the Atlanta headquarters occurred.

11. Without consulting with headquarters personnel, Quintanilla developed his own form letter involving a credit inquiry of customers. As a result Quintanilla developed a serious problem in his relationship with Sammons Communications, the largest single account in his territory. This customer became unhappy with the situation and it requested that Quintanilla no longer service its account. Forrester advised Quintanilla of this problem, who then had further contact with the customer, apologized for his form letter and ultimately straightened out his relationship so that the customer decided to continue to permit Quintanilla to contact it.

12. Quintanilla's intense, aggressive, and sometimes overbearing style in dealing with people also caused difficulty with other customers and produced at least one

other request from a customer that Quintanilla no longer service that customer's business.

13. Forrester did furnish Quintanilla with a memorandum in May 1980 to the effect that he was performing in a satisfactory manner. A memorandum with identical language was furnished to all sales personnel as an incentive message and it was not intended to constitute an individual evaluation of the qualifications of an employee.

14. Because of Quintanilla's problems in interfacing, both in dealing with headquarters personnel of Scientific-Atlanta and with customers, in July 1980 Forrester decided that Quintanilla was not suited for continued employment in a sales position in the Cable Division. On August 15, 1980, Forrester gave Quintanilla an opportunity to resign his employment or else be terminated. Quintanilla refused

to resign, whereupon Forrester terminated his employment as of August 15.

15. On August 31 Quintanilla wrote Scientific-Atlanta a letter regarding his termination and requesting a reference letter. Headquarters personnel of Scientific-Atlanta ultimately arranged for Quintanilla to receive a helpful reference letter to assist him in obtaining further employment and provided him with three (3) months severance pay. In his dealings with Scientific-Atlanta following his discharge, Quintanilla did not assert or claim that his discharge was based on his national origin. At the time Quintanilla felt that Forrester terminated him so that he could employ a younger person who would not be as independent as Quintanilla had been.

16. Quintanilla was replaced by a salesman who was an Anglo.

17. Forrester was not aware of Quintanilla's Mexican-American national origin until after Quintanilla was terminated.

18. Quintanilla does not believe that persons at Scientific-Atlanta other than Forrester discriminated against him on the basis of his national origin. Quintanilla does not believe that Forrester discriminated against him in the terms and conditions of his employment with Scientific-Atlanta other than Forrester's decision to terminate him in July 1980.

19. Scientific-Atlanta's decision to terminate Quintanilla was not based on his national origin but because of his inability to satisfactorily perform the duties of his position.

20. Following his termination, Quintanilla decided not to further pursue a career in sales work because he lost confidence in his ability to satisfactorily perform sales work as a result of his ter-

mination by Scientific-Atlanta. Quintanilla undertook a study in computer technology and was employed as a systems manager for E-Systems on January 21, 1981. Quintanilla was initially employed at an annual salary of $24,000, and he received raises in December 1981 to $27,000 and in May 1982 to $29,000. When terminated by Scientific-Atlanta Quintanilla was earning $27,000 annually, plus bonuses of $5,000 each quarter of the year and a car allowance of $3,000 per year.

Conclusions of Law

1. The Court has jurisdiction over this action under 28 U.S.C. 1343 and 42 U.S.C. 2000e et seq. Venue is proper in the Northern District of Texas.

2. Scientific-Atlanta is an employer within the meaning of 42 U.S.C. 2000e, and all statutory conditions precedent to the filing of Quintanilla's action under Title VII of the Civil Rights Act of 1964, have been fulfilled.

3. The plaintiff in a Title VII action bears the burden of establishing a prima facie case of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

4. The plaintiff in a wrongful discharge action may establish a prima facie case of discriminatory discharge under the McDonnell Douglas model by showing that (1) he was a member of a protected class,

(2) he was qualified for the job from which discharged; (3) he was discharged, and (4) after the discharge, the employer filled the position with a nonclass member. EEOC v. Brown & Root, Inc., 688 F.2d 338 (5th Cir. 1982).

5. If the plaintiff succeeds in proving a prima facie case of discrimination, the burden shifts to the employer to clearly set forth some legitimate, nondiscriminatory reason for the employee's discharge. Burdine, supra, 450 U.S. at 253. This is merely a burden of production, not persuasion. Id. at 256-57.

6. Should the defendant carry its burden of production, the plaintiff must then be given an opportunity to prove by a preponderance of the evidence that the proffered reasons were not the true reasons for the employer's decision, but rather were a pretext for discrimination. Burdine, supra, 450 U.S. at 256. The

burden of showing that the reasons articulated by the defendant are pretextual merges with the plaintiff's ultimate burden of persuading the Court that he was the victim of intentional discrimination. Id. at 256.

7. Pretext may be shown through proof that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. Id. at 256.

8. In light of these principles, this Court finds, at the outset, that Quintanilla has established a prima facie case of discrimination on the basis of national origin. Quintanilla, as a Mexican-American, is a member of a protected class; he was presumably qualified for the position he held (he was hired for the position, and Scientific-Atlanta has not contested his basic qualifications for the job); he was discharged; and he was replaced by a

nonclass member.

9. In response, Scientific-Atlanta set out a legitimate, nondiscriminatory reason for Quintanilla's discharge. Quintanilla was shown to have been discharged because of his inability to interact both with customers of Scientific-Atlanta and with headquarters personnel in Atlanta and to satisfactorily perform his assigned duties.

10. Quintanilla failed to demonstrate that the proferred reasons for his discharge were pretextual. Quintanilla attempted to undermine the credibility of Scientific-Atlanta's explanation for his discharge by attempting to show that much of the underlying basis for Forrester's decision to terminate him did not in fact exist. He further explained that his aggressive nature in dealing with his customers and other company personnel was a trait growing out of his upbringing as a

Mexican-American in an Anglo environment. However, this relationship was not shown to have been known to Forrester nor played a role in his decision to terminate Quintanilla. "It is now well settled in employment discrimination cases ... that for an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory and that the asserted reason for discharge is therefore not a mere pretext for discrimination." Moore v. Sears, Roebuck and Co., 682 F.2d 1321, 1323 n.4 (11th Cir. 1982); see Jeffries v. Harris County Action Assoc., 615 F.2d 1025, 1036 (5th Cir. 1980); Corley v. Jackson Police Dept., 566 F.2d 994, 1003 & n.14 (5th Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1256 (5th Cir. 1977).

11. Quintanilla did not carry his burden of persuasion on the issue of discriminatory intent in Scientific-Atlanta's decision to terminate him.

12. Section 706(g) of Title VII provides that this Court may not accord relief to an individual as an employee if he was discharged "for any reason other than discrimination on account of race, color, religion, sex or national origin . . . ." Therefore, the Court concludes that since Scientific-Atlanta did not termination Quintanilla because of his national origin requires that he be denied all relief and that judgment be entered in favor of Scientific-Atlanta as to all claims.

13. Any finding of fact which is determined also to be a conclusion of law is so deemed, and any conclusion of law which is determined also to be a finding of fact is so deemed.

It is so ORDERED.

Dated this 6 day of January, 1983.

/s/ R. M. HILL

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION NO. CA-3-81-1437-D

R E P R I N T

DIONICIO QUINTANILLA, JR.,

Plaintiff

V.

SCIENTIFIC-ATLANTA, INC.,

Defendant

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J U D G M E N T

This action came on for trial before the Court, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be

dismissed on the merits, and that the defendant Scientific-Atlanta, Inc., recover of the plaintiff Dionicio Quintanilla, Jr., its costs of action.

Dated at Dallas, Texas, this 6 day of January, 1983.

/s/ Robert M. Hill

United States District Judge